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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Review of the Commission's Regulations Governing Attribution of Broadcast Interests	)	MM Docket No. 94-150
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	)	MM Docket No. 92-51
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154

To: The Commission

COMMENTS OF TRIBUNE BROADCASTING COMPANY

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Tribune Broadcasting Company ("Tribune"), by its attorneys, hereby submits its comments in response to the above-captioned Notice of Proposed Rulemaking (the "NPRM") issued on January 12, 1995.[1] In the NPRM, the Federal Communications Commission (the "FCC" or the "Commission") proposes to review various rules and policies governing the attribution of broadcast media interests. With respect to the issues raised in the NPRM, Tribune states as follows:

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[1] See NPRM, MM Docket Nos. 94-151, 92-51, 87-154 (released Jan. 12, 1995); see also Order Granting Extension of Time for Filing Comments and Reply Comments, MM Docket Nos. 94-151, 92-51, 87-154 (released Apr. 7, 1995).

I. INTRODUCTION

In the NPRM, the Commission seeks comment on potential changes to its broadcast attribution rules,[2] as well as various other regulations and policies affecting investment in the broadcast industry. Specifically, the Commission has sought comment on possible changes to its various stockholding benchmarks that define cognizable interests for the purpose of applying the FCC's multiple ownership rules to specific ownership situations. Among other issues, the Commission seeks comment on whether the minimum level of ownership in a corporation should be increased from 5% to 10%. Additionally, the Commission requests comment on the propriety of maintaining the non-attributable status of any minority stockholding in a corporation of which there is a single majority stockholder. The FCC also has sought input on the potential treatment, for attribution purposes, of ownership interests in a limited liability company ("LLC"), a relatively new form of business association recognized in at least 45 states and the District of Columbia.

Tribune, through its subsidiaries, owns six radio and eight television stations in nine markets throughout the United States. Tribune or its affiliates also publish and distribute newspapers, produce and distribute video programming, gather and

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[2] See Report & Order, MM Docket No. 83-46, 97 F.C.C.2d 997 (1984) ("Attribution Order"), recon. in part, 58 R.R.2d 604 (1985), further recon., 1 FCC Rcd. 802 (1986).

distribute news and other information on a variety of media of mass communication, and own and operate other businesses in the entertainment and communications industries.[3] Given its experience and interest in ownership, operation and investment in media of mass communications and other ventures, Tribune recommends that the FCC adopt attribution policies that foster the ability of broadcast stations to compete in the competitive market for the delivery of video programming. The Commission's attribution policies should reflect the manner in which the various business entities generally function in practice, rather than overcompensate for feared abuses that can be discovered and corrected under existing Commission policies and precedent.

II. SUMMARY

First, Tribune advocates that the Commission not arbitrarily make the general determination that LLCs are to be treated on a *per se* basis as limited partnerships. The LLC is now popular precisely because it provides advantages of both corporations and partnerships. LLCs are created pursuant to state statutes that generally provide great flexibility in the

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[3] Concurrent with the filing of these Comments, Tribune is filing comments in the FCC's related rulemaking proceeding analyzing its policies governing diversity and competition in the video programming delivery market, including the television multiple ownership rules. See Review of the Commission's Regulations Governing Television Broadcasting, FCC 94-322 (adopted Dec. 15, 1994) ("Multiple Ownership NPRM"). A more detailed description of Tribune's ownership of broadcast stations is contained in those comments, which are incorporated by reference herein.

manner in which the LLC may be organized and operated. The state statutes governing LLCs generally permit LLCs to be organized similar to a corporation or similar to a partnership. Given the flexibility of the requirements for the organization and management of an LLC, the increased use of LLCs is likely to lead to greater investment in the broadcast industry, making the industry more competitive.

To foster this investment and competition, and to reflect the actual manner of operation of individual LLCs, the Commission should treat each LLC, for attribution purposes, as the type of entity it resembles according to defined criteria established by the Commission -- either a partnership or a corporation. The Commission can require LLCs to demonstrate how they function in their initial applications, their assignment and transfer of control applications, and their ownership reports. Based on the LLC's organizational and operational documents, the LLC can demonstrate that it should be treated for FCC attribution purposes as either a partnership or corporation, subject to appropriate review by the FCC staff.

Second, Tribune supports the retention of the Commission's single majority shareholder policy. The conditions and assumptions that supported the adoption of the Commission's single majority shareholder rule have not changed, nor has experience demonstrated error in these assumptions. To the contrary, the FCC's experience with various licensees controlled by a single majority shareholder has confirmed the propriety of the general conclusion that no minority shareholder of a licensee controlled by a single majority shareholder can influence or control the programming and other activities of a corporate licensee in a manner that warrants attribution. Thus, Tribune believes that the FCC should retain its general "single majority shareholder exception" in its attribution policies because it has provided and will continue to provide numerous opportunities for investment in the broadcast industry by entities that otherwise would not be able to do so.

Moreover, there is no need to eliminate or change the policy based on fears that holdings of preferred stock or convertible debt can provide minority shareholders with influence that detracts from a single majority shareholder's control of a venture. Issuances of preferred stock and convertible debt are a standard and accepted mechanism for the infusion of capital that exist in all industries and do not as a general rule significantly increase the level of influence held by the minority shareholder to a level that dilutes the control of the corporation by the single majority shareholder. Rather than change its single majority shareholder attribution policy, the FCC can utilize its already existing policies and precedents to identify and to redress rare situations in which minority shareholders have control or a level of influence in the licensee that transcends its minority ownership.

Third, Tribune supports increasing the attribution limits for voting stock. It has become apparent in the years since the release of the Attribution Order that the stockholding benchmarks adopted in that Order are too stringent, resulting in the attribution of certain interests which provide little or no opportunity for the stockholders to exercise any influence or control over the licensee. Tribune agrees with the FCC's tentative conclusion in the NPRM that the stockholding benchmark for voting shareholders should be raised to 10 percent. Tribune also proposes that the Commission concomitantly increase the benchmark for attribution of interests held by qualified institutional investors from 10% to 20%. Raising these benchmarks will result in increased investment in the broadcast industry, both by current licensees and by new entrants in the market, without providing any more opportunity to control or influence corporate licensees.

III. LIMITED LIABILITY COMPANIES SHOULD BE TREATED LIKE LIMITED PARTNERSHIPS IF THEY ARE STRUCTURED AND OPERATED LIKE PARTNERSHIPS BUT SHOULD BE TREATED LIKE CORPORATIONS IF THEY ARE STRUCTURED AND OPERATED LIKE CORPORATIONS

In the NPRM, the Commission recognizes its relative lack of experience with the operation of LLCs, a relatively new form of business organization. NPRM, ¶ 68. The Commission therefore seeks comment on the manner in which it proposes to treat all LLCs for purposes of applying its attribution rules. Id. ¶¶ 64-75. Specifically, the Commission has tentatively proposed to treat LLCs like limited partnerships, regardless of the specific operation of the LLC.

While Tribune recognizes that certain LLCs will function like partnerships, and therefore should be treated like limited partnerships, the FCC should understand that a great number of LLCs are managed and controlled much more like corporations. Many entities are formed as LLCs, in fact, specifically to permit the entity to operate in all respects like a corporation, with the exception of the tax treatment of profits and losses. Because Tribune believes that the Commission's regulations should be tailored to the actual operation of the business, it advocates that LLCs that are managed and controlled like corporations should be treated like corporations for purposes of applying the attribution rules. Such treatment not only will comport better with the practical business reality, but also will facilitate investment by experienced communications companies in new communications ventures.

LLCs were first authorized in this country in 1977.[4] Since that time, at least forty-five other states and the District of Columbia have enacted limited liability company acts

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[4] Wyoming was the first state to enact a limited liability company statute. See 1 William D. Bagley & Philip P. Whynott, The Limited Liability Company § 1:20 (1994) (hereinafter "The Limited Liability Company.")

as well.[5] See The Limited Liability Company § 1:20. Among those statutes, there are a number of different approaches to the formation and operation of LLCs. Common to all statutes, however, is the notion that an LLC is neither a corporation nor a partnership. Instead, an LLC combines certain advantageous elements of both of those business forms -- it offers both the limited liability of a corporation and the pass-through tax advantage of a partnership.[6]

Many of the limited liability company acts allow a choice in management structure. In fact, "[i]n most states, an LLC is free to make whatever arrangements it desires with respect to management." The Limited Liability Company, § 7:40. As a general matter, these statutes provide the option for the articles of organization of an LLC specifically to provide for management by managers as in a corporation.[7] See, e.g., Ariz.

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[5] The advantages of LLCS have been described by one expert as including (1) limited liability for members, (2) lack of limitations on the number or type of members, (3) the option for centralized management by members, (4) the members' income tax is taxed at an individual rate with the availability of losses for use by members on personal income tax return, and (5) the distributions to members may be disproportionate. O'Gradney, Fletcher Corp. Forms Ann., § 4295.153 (Cum. Supp. Mar. 1995).

[6] In order to qualify as a partnership for tax purposes, an LLC can have no more than two of the following "corporate characteristics:" (1) continuity of life, (2) centralization of management; (3) limited liability, and (4) free transferability of ownership interests. See 26 C.F.R. § 301.7701-2. As is discussed below, the FCC's treatment of LLCs should focus primarily on the centralization of management of corporations.

[7] An LLC's articles of organization are similar in structure and purpose to a corporation's articles of incorporation, and include (continued...)

Rev. Stat. Ann. § 29-681(A); Del. Ann. Code § 18-402. Given the flexibility of the LLC statutes, an LLC could be managed by officers under the direction of a board of directors exactly as a corporation would be managed. The officers and directors of the LLC would have essentially the same rights, duties and obligations as the directors and officers of a corporation.[8] Moreover, the members, or shareholders, of an LLC in this scenario would have rights and liabilities closely analogous to those of the a corporation. Most importantly, just like a corporation, the members, or shareholders, would vote in the manner provided for voting by corporations. The LLC's shareholders also would have no authority or power to act for or on behalf of the LLC or to bind the LLC or to incur expenditures on behalf of the LLC. Like corporate shares, the shares in the LLC would be the separate personal property of the shareholder of

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[7] (...continued)
information such as the purpose and duration of the LLC, the nature and amount of capital and other contributions, and whether the LLC will be controlled by members or managers. See The Limited Liability Company, § 4:10. The other primary organizational document for an LLC is the operating agreement, which controls the internal structure and management of the LLC and is similar to a corporation's bylaws and to a partnership agreement. Id. § 5:10.

[8] The LLC's board of directors would have the responsibility for management and control of the business of the LLC. The directors would be elected by the shareholders in the LLC, and the officers would be appointed by the LLC's board of directors. The duties of the officers of the LLC would be analogous to the duties of corporate officers, and the standard of liability for the LLC's directors and officers would be comparable to the standards for corporate officers. The LLC's procedures for meetings, including those held by directors and shareholders of the LLC, would be identical to the procedures for corporate governance.

the LLC and would not entitle the shareholder to any direct interest in the LLC's property.

Because, as demonstrated, this choice of management structure enables an LLC to be managed and controlled exactly like a corporation, the FCC should not adopt a _per se_ rule regarding the treatment of all LLCs for purposes of the attribution rules. To do so would be arbitrary and unsupported by the practical business reality, imposing a false uniformity in this area and treating some LLCs in a way that is contradictory to the actual operation of the particular entity.

For this reason, other government agencies do not have one _per se_ rule regarding the treatment of LLCs. For example, each statute authorizing an LLC is scrutinized separately by the Internal Revenue Service ("IRS") to determine whether or not the IRS will consider LLCs formed under that state's limited liability company act as corporations for tax purposes. _See, e.g._, Rev. Rul. 88-76 (Wyoming LLC act); Rev. Rul. 93-5 (Virginia LLC act); Rev. Rul. 93-38 (Delaware LLC act); Rev. Rul. 93-53 (Florida LLC act); Rev. Rul. 94-51 (New Jersey LLC act).

Additionally, the flexibility which helps to make the LLC an attractive business form for investment in the broadcast industry will be defeated if the FCC refuses to permit each LLC to be treated in accordance with the manner in which it is managed and controlled. Such a refusal can serve only to inhibit the use of LLCs in the broadcast industry and thereby preclude an attractive new business form from becoming an integral part of making the broadcast industry competitive. The ultimate result of a decision by the Commission to treat all LLCs as limited partnerships for attribution purposes, regardless of the LLC's form of organization and operation, would be to inhibit investment by curtailing the attractiveness of LLCs.[9] Small businesses and minorities seeking to use the LLC as a form of raising capital and obtaining the benefits of certain experience or facilities that have no impact on the control of the LLC will not have such access if investors demand the tax advantages of an LLC, but are saddled with an attributable interest for their investment.[10]

In this light, the Commission's adoption of a policy treating all LLCs as limited partnerships would contravene the Commission's own asserted goals of the NPRM. The Commission has stated that "[a] rule of general applicability drawn so strictly as to include every possible influential interest would ensnare innumerable interests that have no ability to impart influence or control over a licensee's core decision-making processes to their

[9] The LLC will enable communications companies that already have experience and background in the industry to provide capital to smaller and less experienced broadcast entities and to lend their experience without exerting any influence over these entities.

[10] An entity that is formed as an LLC is most often organized as an LLC in order to take advantage of the combination of benefits offered by the LLC statutes. The pass-through tax advantages of a partnership are one of the important benefits, as is the limited liability of a corporation.

holders." NPRM, ¶ 16. As demonstrated, under almost every LLC statute, an LLC can be organized in such a way that it would be arbitrary and capricious to treat the LLC differently from a corporation.

The Commission should permit LLCs to elect whether they should be treated like a corporation or a partnership. The Commission could review each LLC's determination at the time of the filing of an initial license application or a transfer or assignment application. Alternatively, the Commission could treat all LLCs as partnerships unless the LLC affirmatively demonstrated in an application that its structure warranted treatment as a corporation for attribution purposes. The criteria to make this determination should include the factors discussed above; if an applicant demonstrated that its LLC had officers, directors and shareholders with the duties, rights and structural requirements that were analogous to those of a corporation, the FCC would treat the LLC as a corporation for purposes of applying the attribution rules.

Under this scenario, an applicant would be required to demonstrate, for example, that:

1. The LLC is managed by officers under the direction of a board of directors;

2. the officers and directors of the LLC have essentially the same rights, duties and obligations as the directors and officers of a corporation;

3. the LLC's board of directors have complete and exclusive discretion in the management and control of the business of the LLC;

4. the directors of the LLC are elected by the shareholders of the LLC;

5. the officers of the LLC are appointed by the LLC's board of directors;

6. the duties of the officers of the LLC are analogous to the duties of corporate officers;

7. the LLC's procedures for holding organizational meetings, including those held by directors and shareholders of the LLC, are identical to the procedures in the same state for holding corporate meetings;

8. the members or shareholders of an LLC vote in the manner provided for voting by corporations;

9. the LLC's shareholders have no authority or power to act for or on behalf of the LLC;

10. the LLC's shareholders have no authority or power to bind the LLC or to incur expenditures on behalf of the LLC;

11. the shares in the LLC are the separate personal property of the shareholder of the LLC and do not entitle the shareholder to any direct interest in the LLC's property; and

12. the shareholders in the LLC have rights and obligations analogous to those of a corporate shareholder in the same state in which the LLC is organized.

To ensure that the FCC treats a particular LLC as the type of entity that it most resembles, the FCC could require an LLC to file its organizational documents, including its articles of organization and operating agreements, just as the Commission requires the articles of incorporation and by-laws of a corporation to be filed with the Commission. In this way, the

FCC can review each LLC for compliance with the guidelines that are established for treatment as a corporation or a partnership.

IV. <u>**THE SINGLE MAJORITY SHAREHOLDER RULE SHOULD BE RETAINED BECAUSE IT IS SUPPORTED BY SOUND POLICY, HAS NOT BEEN ABUSED, AND POTENTIAL ABUSES ARE SUBJECT TO EXISTING PROTECTIONS UNDER CURRENT FCC PRECEDENT**</u>

In the <u>NPRM</u>, the Commission seeks comment on whether it should continue to retain its policy of making non-cognizable any interest in a corporation held by a minority shareholder when that corporation is controlled by a single majority shareholder. <u>NPRM</u>, ¶ 51. For a variety of reasons, the Commission's "single majority shareholder" is appropriate and should be retained. The policy was adopted based on sound legal principles and policy and has not been abused in the past.

Moreover, the Commission's concern that non-voting capital instruments such as preferred stock and convertible debt provide minority shareholders with an appreciable ability to influence corporations with a single majority shareholder does not warrant any change in the FCC's current policy. The issuance of preferred stock and convertible debt are standard financing vehicles in every industry and exist apart from any considerations of corporate influence and control. The Commission already has a variety of policies and precedents used by minority shareholders to exercise an undue amount of influence or control over licensees.

As an initial matter, the Commission's "single majority shareholder" exception to the attribution of otherwise attributable stock interests is founded on solid principles. The FCC's words in adopting the single majority shareholder rule in 1984 were true then and are no less true today:

> In those instances where a corporate licensee, whether closely or widely-held, has a single majority voting stockholder, it appears neither necessary nor appropriate to attribute an interest to any other stockholder in the corporation. In these circumstances, the minority interest holders, even acting collaboratively, would be unable to direct the affairs or activities of the licensee on the basis of their shareholdings.

Attribution Order, 997 F.C.C.2d at 1008-09. See also NPRM, ¶ 51. Subsequently, both Congress and the FCC itself recently have recognized the validity of this analysis. In 1991, in reporting S. 12, the Cable Television Consumer Protection Act, the Senate Committee on Commerce, Science and Transportation (the "Committee") adopted the FCC's perspective on attribution. In its Report, the Committee stated that:

> In determining what is an attributable interest, it is the intent of the Committee that the FCC use the attribution criteria set forth in 47 CFR Section 73.3555 (notes) or other criteria the FCC may deem appropriate.

S. Rep. No. 102-92, 102d Cong., 1st Sess. (1991). The rules referenced by the Committee include the "single majority shareholder" exception. Subsequently, in its proceeding implementing the Cable Television Consumer Protection and Competition Act, as passed in 1992, the Commission expressly recognized the continuing validity of the "single majority shareholder" exception in proposing to adopt that exception in its new cable rules. See Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd. 6828, 6851 (1993).

As a matter of legal and practical substance, the Commission was correct when it found that "a simple majority vote is sufficient to direct the affairs of the corporate licensee." Attribution Order, 97 F.C.C.2d at 1009 n.21. Even if the minority shareholder has contributed a large amount of equity or holds a significant number of nonvoting shares in addition to its minority voting interest, the single majority shareholder still will be able to direct the affairs of the corporation through a majority vote. To the extent that it is impossible to overcome the will of the single majority shareholder in a vote, regardless of whether the minority shareholder acts alone or with other minority shareholders, the single majority shareholder lacks the power and the "ability to influence or control the operations of the licensee, including core functions such as programming." NPRM, ¶ 13.

Nevertheless, the FCC has expressed a concern that a minority shareholder can exert influence over a majority shareholder where the minority shareholder holds certain rights under financial instruments such as preferred stock or convertible debt. For at least three reasons, the FCC's concern does not warrant a change in the current policy.

First, the use of convertible debt and other capital instruments that provide no vote or other right to influence the operation of an entity is widespread in many industries for purposes wholly unrelated to influence or control. For many years, numerous companies have used convertible debt and other similar instruments like warrants, preferred stock and non-voting stock because it provides a vehicle for raising capital <u>without</u> affecting control or influence of the companies. <u>See</u>, <u>e.g.</u>, Airline Financial News, April 10, 1995 (UAL Corp.); Work-Group Computing Report, April 17, 1995 (Motorola); Venture Capital Journal, April 1995 (Software Artistry Inc.); Energy Alert, March 10, 1995 (Bounty Group Inc.); Sporting Goods Business, February 1994 (SportsTown Inc.); The Oil Daily, October 3, 1985 (North Canadian Oils).[11] The Commission should not deter innovative investment in the competitive media marketplace by restricting the ability of broadcast companies to access investment through vehicles like convertible debt, especially at a time when such

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[11] <u>See</u> <u>also</u> ComputerGram International, January 5, 1995 (WaveLink Technologies, Inc.); Battery & Electric Technology, January 1995 (Electrosource Inc.); Petroleum Economist, June 1994 (Apache Corp.); The IPO Reporter, May 20, 1991 (Sanifill). Many of the issuances of preferred stock and convertible debt are provided to large institutional investors as additional incentive to provide significant capital for new ventures. <u>See</u>, <u>e.g.</u>, ComputerGram International, January 5, 1995 (WaveLink Technologies, Inc.); Airline Financial News, April 10, 1995 (UAL Corp.).

capitalization appears to be important to entire elements of competitive industries. See "NAB Show Told That More Institutions Are Willing To Lend To Radio," Communications Daily, October 13, 1994 (importance of convertible debt to financing radio stations).

Second, the FCC's experience in the last ten years has not shown any notable level of abuse of the "single majority shareholder" exception where minority voting holdings are accompanied by preferred stock or convertible debt instruments. In at least two published cases, the FCC has determined that the single majority shareholder exception was appropriate and was not the subject of abuse. See KKR Associates, 2 FCC Rcd. 7104 (1987); National Broadcasting Company, Inc. (WKYC-TV), 6 FCC Rcd. 4882 (1991) ("WKYC-TV"). In KKR Associates, the Commission determined that the Busse family's control of a corporation was not affected by Gillett's rights under certain financial debentures. Id. at 7106. The Commission concluded that Gillett's minority ownership interest was not attributable in light of the fact that the Busses ultimately were the single majority shareholder of the licensee. Id. Similarly, in WKYC-TV, the Commission determined that Multimedia's role as the single majority stockholder of a licensee appropriately prevented NBC's significant equity interest from being attributable, despite the fact that the station was an NBC network affiliate.

Third, the Commission should not eliminate the "single majority shareholder' exception because it already has an extensive body of precedent to assist in evaluating the rare instances where a minority shareholder is exercising an undue amount of influence or control over a corporation. See, e.g., KKR Associates, supra, 2 FCC Rcd. at 7105-09; WKYC-TV, supra, 6 FCC Rcd. at 4883-84. The Commission has a long history of entertaining and assessing contentions concerning the impact of various arrangements on the influence and control of broadcast ventures. See, e.g., Phoenix Broadcasting Co., 44 F.C.C.2d 838 (1973), Fine Arts Broadcasting, Inc., 57 F.C.C.2d 108 (1975). Moreover, the Commission's precedent and policies have been used to evaluate the influence provided by financial arrangements including options and convertible debt on a case-by-case basis. See, e.g., The Seven Hills Television Company, 2 FCC Rcd. 6867, 6877-87 (Rev. Bd. 1987). Given the precedent that can be used to evaluate abuses of the single majority shareholder exception on a case by case basis, the Commission should not adopt a policy that restricts the use of financing vehicles like preferred stock or convertible debt, especially where the use of such vehicles is prevalent in all industries and there is no history of abuse.

In fact, the Commission should relax one of its policies concerning corporations controlled by single majority shareholders. At the present time, the FCC staff will not permit minority shareholders to have the right to elect a director to the board of a corporation, regardless of the fact that the single majority shareholder can elect the directors that will control all decisions made by the board. Minority shareholders therefore are not able to receive information about the performance and operation of the corporation which affect their evaluation of their investment but is not ordinarily available to stockholders. The Commission should permit minority shareholders to elect a director to the board of a corporation controlled by a single majority shareholder merely to receive such information where the election of the director does not affect the election of a controlling block of directors of the corporation.

There are a great number of broadcasters and other investors that have participated in transactions, structured agreements, and expended large sums of money in reliance on the single majority shareholder exception. If the Commission does decide to restrict the availability of the single majority shareholder exemption, the new rule should work prospectively only. To refuse, at the least, to grandfather those existing arrangements would create chaos where none is necessary.

V. **INCREASED ATTRIBUTION BENCHMARKS FOR VOTING STOCK WOULD INCREASE INVESTMENT AND COMPETITION WITHOUT IGNORING INTERESTS THAT HAVE A SUBSTANTIAL LIKELIHOOD OF EXERCISING SIGNIFICANT CONTROL OR INFLUENCE ON LICENSEES**

In its NPRM, the Commission has recognized the logical appropriateness for increasing the attribution level for ownership of voting stock in a corporation from five percent to ten percent. NPRM, ¶¶ 21-24. Tribune supports such an increase for at least three reasons.

First, in Tribune's experience, the difference between a level of investment of five percent and a level of investment of ten percent is negligible with respect to the level of control or influence that can be exerted over the corporation. In fact, even in situations where there is no single majority shareholder, shareholders owning between ten percent and twenty percent most often do not exercise significant influence or control.[12] For this reason, for example, as the Commission has recognized, the Clayton Act only imposes premerger notification and waiting period requirements on certain corporations planning to acquire 15% or more of a corporations voting stock. 15 U.S.C. § 18.

Second, Tribune believes that increasing the benchmark from five percent to ten percent will increase the investment of large communications companies in new and developing communications ventures, and not, as the Commission fears, simply increase the level of investment that can be maintained by large investors in larger, established media ventures. As demonstrated in Tribune's Comments in the Multiple Ownership NPRM, filed concurrently herewith, the market for delivering video programming has become extremely competitive during the ten years

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[12] As demonstrated above, in situations where a corporation is controlled by a single majority shareholder, minority shareholders do not exercise significant influence or control over corporations.

since the adoption of the FCC's Attribution Order. Prime factors for successful entry into this market now include access to capital, media experience, and facilities that can be operated on a scale providing efficiencies comparable to larger, more established competitors. Companies that can provide such access to capital, experience and facilities often have attributable investments or participation in other ventures. The proposed increase in the benchmark will increase the ability of smaller companies to recruit a critical level of investment from investors who will not have cognizable influence or control over the venture.[13]

Third, as the Commission has recognized, in a number of other regulatory contexts, ownership interests of ten percent are deemed to be not cognizable. For example, in implementing acreage limitations to federally leased mineral rights, Congress enacted a ten percent attribution threshold to provide a mechanism for the Department of Interior to enforce ownership restrictions applicable to limited resources that are owned by the public. See 30 U.S.C. § 184(d); Notice of Proposed Rulemaking, MM Docket No. 92-51, 7 FCC Rcd. 2654 (1992) ("Capital NPRM"). Additionally, the Securities and Exchange Commission maintains a similar ten percent benchmark in its "insider trading" restrictions, presuming that only interests at or above

[13] This is especially true for smaller businesses owned by minorities or businesses that are seeking to develop and establish new products or services.

this level are in a position to make unfair use of nonpublic information about the corporation. See 15 U.S.C. § 78p(b); Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582, 591 (1973). Finally, the Department of Transportation ("DOT") employs a ten percent benchmark for requiring compliance with certain reporting and certification requirements applied to air carriers. See 14 C.F.R. § 204. In adopting its "attribution" benchmark of ten percent, DOT concluded that only owners of ten percent or more of a corporation's stock had "the potential for significant influence on a carrier's operations." See Notice of Proposed Rulemaking, 56 Fed. Reg. 27696, 27699 (June 17, 1991) ("DOT NPRM").

These varied regulatory benchmarks of ten percent have been established for regulation that should be no less restrictive than those mandated by the Communications Act. DOT's ten percent benchmark was adopted for almost precisely the same purpose as the FCC has adopted its attribution benchmarks, to set a level of ownership below which a stockholder generally does not exercise a sufficient level of influence to implicate any of the policies or objectives at issue in DOT's regulation. Compare NPRM, ¶¶ 2-11 with DOT NPRM, 56 Fed. Reg. at 279697-279699. Moreover, the SEC's ten percent benchmark has been established to set a level of ownership that can reflect involvement that does not amount to influence or control, but only access to nonpublic information. Where the FCC is concerned with a level of involvement that reflects more than access to information, but